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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DIVERSIFIED MEDICAL RECORDS SERVICES, INC.,

Plaintiff and Respondent,

v.

CHARTSQUAD, LLC,

Defendant and Appellant.

G056599

(Super. Ct. No. 30-2018-00979971)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Theodore R. Howard, Judge. Affirmed in part and reversed in part with directions.

Melanie Carpenter for Defendant and Appellant.

Owens & Gach Ray, Robert B. Owens and Linda Gach Ray for Plaintiff and Respondent.

INTRODUCTION

ChartSquad, LLC, appeals from an order denying its motion to strike under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] ChartSquad moved to strike the complaint of Diversified Medical Records Services, Inc., after Diversified sued ChartSquad for unfair competition. Diversified alleged that ChartSquad was improperly requesting copies of patient medical records under federal law instead of California state law, which permits copying services like Diversified to charge higher prices for copying medical records. Diversified also alleged that ChartSquad was writing letters to the federal government accusing Diversified of violating federal regulations about copying patient records.

The trial court denied the anti-SLAPP motion. We affirm in part and reverse in part. We agree with the trial court that most of Diversified's allegations do not involve protected conduct. But the part of Diversified's complaint dealing with writing letters to the government does implicate protected conduct, and Diversified cannot prevail on this part. Accordingly it must be stricken from the complaint.

FACTS

ChartSquad is an online service for requesting copies of patient medical records from health care service providers, such as physicians and hospitals. Diversified fulfills requests for copies of medical records for providers from whom records have been requested. Diversified charges for these services, and what it can charge for its copying services is subject to both state and federal law. So whether a request is made under state law or federal law has a direct impact on its profit margin.

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

I. Statutory Background

Under California law, Evidence Code section 1158, subdivisions (e) and (f), regulates the amount a copying service like Diversified can charge for medical records requested by an attorney in anticipation of litigation.[2] Federal statutes pertaining to this issue are found in the Health Insurance Portability and Accountability Act, Title 42 United States Code sections 1320d et seq. (HIPAA), enacted in 1996 to protect the privacy of patient records. As our Supreme Court has explained, "Portions of HIPAA were intended to facilitate information exchange among participants in the health care system [citations], but Congress foresaw that with easier transmission of intimate medical details would come a heightened risk of privacy loss. [Citations.]" (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1066.) Congress entrusted the Department of Health and Human Services with formulating the regulations to implement privacy protections for medical records. (*Ibid.*)

Under the original HIPAA regulations, either a patient or a patient's "personal representative" could request medical records from medical providers. The regulations made it clear that a "personal representative" meant someone functioning as a conservator or a guardian and did *not* mean an attorney. (See discussion in *Webb v. Smart Document Solutions, LLC* (9th Cir. 2007) 499 F.3d 1078, 1084-1087; 45 C.F.R. § 164.502(g) (2007).) The HIPAA regulations also specified the kinds of fees a provider or its copying service could charge. (45 C.F.R. § 164.524(c)(4) (2001).) A HIPAA request,

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[2] Evidence Code section 1158, subdivision (b), provides, "Before the filing of any action or the appearance of a defendant in an action, if an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient, or a copy thereof, to a medical provider, the medical provider shall promptly make all of the patient's records under the medical provider's custody or control available for inspection and copying by the attorney at law or his or her representative."

unlike the Evidence Code provision, is not limited to documents to be used in a legal proceeding or in anticipation of litigation.

In 2009, Congress enacted the Health Information Technology for Economic and Clinical Health Act (HITECH), Title 42 United States Code § 17921 et seq., to encourage use of electronic technology for medical records and to put measures in place make these electronic records secure. (See *United States ex rel. Sheldon v. Kettering Health Network* (6th Cir. 2016) 816 F.3d 399, 403.) As relevant to this appeal, the HITECH Act provides, "[a]ccess to certain information in electronic format. In applying section 164.524 of title 45, Code of Federal Regulations, in the case that a covered entity uses or maintains an electronic health record with respect to protected health information of an individual – [¶] (1) the individual shall have a right to obtain from such covered entity a copy of such information in an electronic format and, if the individual chooses, to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific . . . ." (42 U.S.C. § 17935(e).)

In 2013, the Department of Health and Human Services issued a final rule modifying the HIPAA rules to implement the HITECH Act and "to strengthen the privacy and security protection for individuals' health information." (78 Fed.Reg. 5566 (Jan. 25, 2013).) A new regulation was added. 45 Code of Federal Regulations section 164.524(c)(3)(ii) (2019) now provides: "If an individual's request for access directs the covered entity to transmit the copy of protected health information directly *to another person designated by the individual*, the covered entity must provide the copy to the person designated by the individual. The individual's request must be in writing, signed by the individual, and clearly identify the designated person and where to send the copy

of protected health information." (Italics added.) Under the original regulations, only an individual or an individual's personal representative (not an attorney) had a right to obtain copies of the medical records and be charged per HIPAA regulations for these copies. (45 C.F.R. §§ 164.524 (a) (2001); 164.524(c)(4) (2001).) Under the new rule, the request must still come from the individual, but the individual can designate anyone to receive the copies. (45 C.F.R. § 164.524(c)(3)(ii) (2013).)

II. The Lawsuit

Diversified sued ChartSquad under Business and Professions Code section 17200 et seq. for unfair competition. The single cause of action alleged three separate kinds of unfair and fraudulent activity. First, Diversified alleged that ChartSquad was taking unfair advantage of the lower HIPAA rates for copying medical records by disguising requests for medical records from attorneys or other unauthorized parties as requests from patients. In other words, the "individual" making a HIPAA request for medical records was not a patient, but an attorney or an entity like ChartSquad. Without the disguise, attorneys or others would have to request records under Evidence Code section 1158 and pay the higher copying charges. Second, Diversified alleged that ChartSquad was marketing itself to plaintiffs' attorneys. Finally, Diversified alleged that ChartSquad was writing letters to the federal Office of Civil Rights complaining about Diversified's copying charges and accusing Diversified of overcharging patients for copying medical records.[3] Sending these letters, according to the allegations of the complaint, was "designed to injure, disrupt, and destroy [Diversified's] business."

ChartSquad moved to dismiss the complaint under the anti-SLAPP statute. Specifically, ChartSquad argued it was engaging in conduct protected under section

[3] In its opening brief, ChartSquad characterizes the complaint as being mainly about the letters to the Office of Civil Rights. This is inaccurate. The allegation regarding the letters occupies one paragraph of a 10-paragraph complaint.

425.16, subdivision (e), "(2) . . . writing made in connection with an issue under consideration or review by a[n] . . . executive . . . body . . . ." and "(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The trial court denied the motion in its entirety.

DISCUSSION

A SLAPP suit is one that "seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) Section 425.16, the anti-SLAPP statute, provides a means of determining at the outset whether an action is a SLAPP suit before a defendant seeking to exercise its constitutional rights is overwhelmed by attorney fees. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1547.)

A trial court ruling on a motion under section 425.16 engages in a two-step process. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) The court first considers "whether the challenged claims arise from acts in furtherance of the defendants' right of free speech or right of petition under one of the categories set forth in section 425.16, subdivision (e). [Citation.]" (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 209.) The defendant/moving party bears the burden of demonstrating that the claim arises from protected conduct. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) If a claim arises from protected conduct as statutorily defined, the analysis moves to the plaintiff's probability of prevailing. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We review an order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

In 2016, our Supreme Court settled the issue of the anti-SLAPP analysis for a "mixed" cause of action, that is, a cause of action that alleged both protected the unprotected conduct. In *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*), the court determined that an anti-SLAPP motion to strike is a variation of the ordinary motion to strike, long in use in California. (*Id.* at pp. 393-394.) "[L]ike a conventional motion to strike, [it can] be used to attack parts of a count as pleaded." (*Id.* at p. 393.) "[T]he conventional motion to strike, which long preceded the anti-SLAPP statute, is well understood as a way to challenge particular allegations." (*Id.* at p. 394.) The unit of measurement is not the "cause of action" – which could be artfully designed to include both protected and unprotected conduct – but the "claim." (*Id.* at pp. 393, 395.) After *Baral*, an order granting or denying an anti-SLAPP motion need not be an all-or-nothing proposition. The court can examine claims separately to determine whether they arise from protected conduct and, if they do, strike the ones as to which the plaintiff cannot show a probability of prevailing.

With this process in mind, we can dispose quickly of Diversified's third unfair competition claim. Writing letters to a government agency complaining about violations of federal regulations is protected conduct under section 425.16, subdivision (e)(2). "In the analogous context of the privilege under Civil Code section 47 for a statement in an official proceeding, the California Supreme Court has observed that the term 'official proceeding' 'has been interpreted broadly to protect communications to or from *governmental* officials which may precede the initiation of formal proceedings.' [Citation.] Thus, '"communication to an official administrative agency . . . designed to prompt action by that agency"' is '"as much a part of the 'official proceeding' as a communication made after the proceedings had commenced."' [Citations.]" (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009 [complaint to

Securities and Exchange Commission protected "official proceeding" communication]; see *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941-942 [filing police report protected activity]; *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 728-730, disapproved on other grounds *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 [complaint to National Association of Securities Dealers (NASD) protected "official proceeding" activity; NASD has authority to regulate broker conduct].)

Diversified has no probability of prevailing on this aspect of its suit. Even if Chartsquad's complaints are false and ill-intentioned, they are absolutely privileged under Civil Code section 47. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-927.) The motion must therefore be granted as to this claim, and the corresponding allegations seeking to enjoin or impose liability for this conduct must be stricken.

Similarly, the analysis of the first claim is straightforward. The allegation that ChartSquad is misrepresenting patient signatures on the HIPAA requests for medical records ultimately sent to Diversified[4] – requests actually coming from attorneys or other unauthorized parties – does not implicate protected conduct, either free speech or petitioning for redress of grievances. This is a private dispute between private companies. (See *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc*. (2009) 172 Cal.App.4th 1561, 1569 [wrongful conduct committed in business capacity for promoting services not protected activity]; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33-34.)

The second unfair competition claim is a bit more complicated. The complaint alleges only that ChartSquad is "going out into the marketplace, marketing

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[4] Diversified does not actually allege it has had to fulfill improper HIPAA requests ChartSquad has sent to medical service providers, but by alleging a claim for unfair competition, Diversified implies that ChartSquad has done so and that Diversified has lost money in the process. (See Bus. & Prof. Code, § 17204.) We do not consider the merits of a plaintiff's causes of action during the first step of the anti-SLAPP analysis.

themselves to attorneys (particularly plaintiffs' attorneys) . . . ." The complaint does not specify what ChartSquad is telling attorneys. The declaration of Diversified's CEO, submitted in opposition to the anti-SLAPP motion, does not give any additional information about what ChartSquad is saying in the marketplace. It simply repeats the relevant allegation of the complaint. One of the exhibits attached to Diversified's opposition consists of two pages from the April 2015 issue of "The Advocate," identified as the journal of Consumer Attorneys Associations for Southern California. The journal's announcement of "new affiliate vendors" for the month includes ChartSquad, with an explanation that it "offers plaintiff attorneys a revolutionary and singular solution for the requesting, tracking, and delivery of records at a fraction of traditional costs while eliminating in-office labor and delivering records within a 15-day average window."[5] Diversified did not explain why this announcement constitutes unfair competition or false advertising.

While marketing activities can be protected under anti-SLAPP criteria – for example, as writings made in connection an issue of public interest (see *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566-567) – ChartSquad did not carry its initial burden to show that its particular marketing activities, whatever they may be, are protected. The trial court sustained Diversified's objections to ChartSquad's declaration and to its three exhibits, on the grounds that the declarant had not signed the declaration under penalty of perjury under the laws of California and the exhibits were hearsay,[6] so in essence ChartSquad submitted no evidence at all. And in any event, the stricken declaration made no mention whatsoever of any marketing activities. Accordingly, the motion was correctly denied as to the claim regarding ChartSquad's marketing of its services.

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[5] ChartSquad did not object to this exhibit.

[6] The declarant signed the declaration in Utah. ChartSquad did not raise the evidentiary ruling as an issue on appeal.

DISPOSITION

The order denying the anti-SLAPP motion is reversed, and the trial court is directed to enter a new order granting the motion as to the allegations of paragraph 9 of the complaint, striking paragraph 9, and denying the motion in all other respects. The parties will bear their own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.